already answered. Our answers to these questions are: in respect of (1) in the affirmative and in respect of (2) in the negative.

It is also important for us to state that fundamentally knowledge or intention, as the case may be, is strictly a question of fact. Knowledge or intention therefore may be inferred from the circumstances surrounding each particular case.

At the hearing of this reference, Mr. Siva Segara who appeared in person urged upon us to review the facts. We have indicated that the facts of the particular case do not warrant such an exercise. It is clearly revealed that an Extroardinary General Meeting was convened by the Bar Council with a specific purpose, namely, to discuss their objections to the proposed amendments. The gathering decided to send a delegation to Parliament House to distribute copies of the memorandum to Members of Parliament. A large number of members of the Bar who gathered at the Lake Club collected at the gate of Parliament House. Some wore black bands – a sign of mourning. At the gate they stopped cars and distribute leaflets and some booed at the cars that did not stop. It is our view that although there was no direct evidence that those who convened the Extraordinary General Meeting were the persons who convened or organized an assembly of their members at the gate, there was nonetheless ample evidence for an inference to be drawn that the assemblage of the members at the gate was initiated or organized by one or more of their members. The inference can be drawn from the circumstances surrounding this case, in particular, the composition of the assembly, the manner in which they assembled, their conduct prior to and during the assembly and the purpose for which they had assembled. These are some of the relevant factors that should be taken into account to determine knowledge or intention as the case may be. In the final analysis it is our view that knowledge or intention, need not have been formed during the meeting at the Lake Club but could have been formed at any time. It could have been formed before the members departed from the Lake Club or even in the course of their journey to the gate. The convenors or the organizers could well have been one or more of the members of the Bar who remained behind after the delegation had left for Parliament House. We reiterate that this is essentially a question of fact and such being the case the determination of such a question shall depend on the merits of each case. On the basis that there was intention to convene or organize an assembly of three or more persons in a public place and an assembly did take place then such assembly should in law be deemed to be an unlawful assembly and the person or persons who took part in such assembly could by inference be held to have had knowledge that it was an assembly that was convened or organized without a licence being issued under sub-section (2). And therefore the person or persons who took part in such assembly would have committed an offence under sub-section (5)(a) of section 27 and also the person or persons who convened or organized such assembly.

Finally we repeat that the answer to question (1) is in the affirmative while the answer to question (2), as it is framed in the negative, will be negative.

Questions answered accordingly.

Solicitors: *Siva Segara & Co.*

SADIT TIMBER SDN. BHD. & ANOR. v. THE "LING YUNG" AND "THAI YUNG", OWNERS & ORS.

[O.C.J. (Chong Yik Liong J.) December 7, 1982]
[Kuching — Admiralty Action in Rem No. KG. 4 of 1980]

Practice and Procedure — Admiralty — Application to substitute undertaking given to secure release of ship — Whether court has jurisdiction to effect substitution of undertaking — R.H.C. 1980, O. 70 r. 15 — R.S.C. (UK), O. 75, r. 16.

Shipping Law — Admiralty in rem — Application to substitute security given for release of ship — When security can be varied or substituted.

In an action *in rem*, the plaintiffs arrested the ship "Thai Yung" belonging to the defendants. To secure its release, the defendants caused the Hongkong and Shanghai Banking Corporation to give the plaintiffs security by way of an undertaking, *inter alia*, to deposit forthwith M$1.7m with the High Court in Borneo (Kuching Registry) to abide by the order of the High Court in respect of the plaintiffs' claim in the said action. The defendants subsequently applied by way of Summons-in-Chambers for an order to substitute the original undertaking on the grounds that the proposed new undertaking would afford sufficient security to the plaintiffs and that the obligation to immobilise M$1.7m of the defendants' assets was onerous especially where the plaintiffs have not established the defendants' liability in the action.

Held, dismissing the application: (1) the proposed new undertaking could not constitute security as first, in lieu of the actual deposit of M$1.7m, only a guarantee was offered and second, the guarantee would in effect be given for a past consideration viz. to secure the release of a ship which release had been obtained two years ago;

(2) even if the proposed new undertaking afforded sufficient security, the Court had no jurisdiction to order the release of a security not given to the Court and not taking the form of a bail bond under the provisions of the R.H.C. 1980, Order 70, rule 15;

(3) in this case the security was given to the plaintiffs and can only be varied or substituted by mutual agreement or with the consent of the party affected by the variation or substitution;

(4) the ground of hardship to the defendants was wholly irrelevant as the plaintiffs being entitled to the security were not required to establish the defendants' liability to justify their entitlement to such security.

Cases referred to:

(1) *The Moschanthy* [1971] 1 Lloyd's Rep. 37, 40.
(2) *The Alletta* [1974] 1 Lloyd's Rep. 40, 46.

HIGH COURT.

Anthony Liew for plaintiffs.
Chew Pok Oi for defendants.

Cur. Adv. Vult.

Chong Yik Liong J.: This is an application, by way of Summons in Chambers, by the Defendants in an admiralty action *in rem*, for an Order for substituting a fresh Undertaking in Lieu of Bail in terms of the proposed Undertaking in Lieu of Bail annexed thereto (hereinafter called "the New Undertaking") for the Undertaking in Lieu of Bail dated December 3, 1960 (hereinafter called "the Original Undertaking"), on the grounds as appear in the two supporting affidavits, affirmed by Chew Pok Oi respectively on November 20, 1982 and November 26, 1982 and filed herein.

The facts leading to the present application, so far as can be gathered from the affidavit evidence and from information contained in the Court docket are these. On November 21, 1980, the Plaintiffs commenced an action *in rem* against two of the Defendants' ships one of which is named "Thai Yung" (hereinafter called "the ship") and on November 24, 1980 caused the writ to be served and the ship to be arrested off the Port of Bintulu, Sarawak. To secure the release of the ship, the Defendants caused The Hongkong and Shanghai Banking Corporation (hereinafter called "the Bank") to give to the Plaintiffs on December 3, 1980, security by way of an undertaking in terms of the Original Undertaking, by which the Bank, *inter alia*, undertook to forthwith deposit the sum of M$1,700,000.00 with the High Court in Borneo (Kuching Registry) to abide the Order of the High Court, in the event of there being no judgment, agreement, award or settlement made before December 3, 1982, in respect of the Plaintiffs' claim in the said admiralty action.

The grounds relied on by the Defendants in support of this application are:

(1) that the New Undertaking (which the Bank is now prepared to give to the Plaintiffs) will be sufficient security for the Plaintiffs' purposes;

(2) that it would work immeasurable hardship to the Defendants to have M$1.7 million tied up in Court Deposit especially where the Plaintiffs have not established liability against the Defendants on their claims in the admiralty action *in rem*.

In dealing with the first ground, it is necessary for me to peruse the New Undertaking and then consider whether it is sufficient security in place of the security contained in the Original Undertaking. Having perused it, I am of the view that the New Undertaking cannot constitute sufficient security for the security contained in the Original Undertaking, in that besides doing away with the obligation on the part of the Bank to deposit the stipulated sum with the Court, it is in the nature of a guarantee, given in consideration of a past consideration, namely the release of the ship some two years ago, so that its validity as well as enforceability is open to serious doubt.

Even assuming that I were wrong in holding the view I have expressed on the New Undertaking and that the New Undertaking was in fact, sufficient security, the matter does not rest there, because the question arises as to whether the Court has jurisdiction to substitute the New Undertaking for the Original Undertaking.

Counsel for the Defendants submitted that the Court had such jurisdiction. In support of his submission he referred me to *The Moschanthy*[1] where Brandon, J. said:

"Since I am of the opinion that security given has not been shown to be excessive, it is unnecessary for me to consider a further argument advanced for the plaintiff that, because the method of giving security and the amount were agreed, the defendants were in any case precluded from claiming that the amount was excessive and should be reduced. I shall only say that I am not at present convinced that the Court's power to control the amount of security in actions *in rem* would be ousted by an agreement of this kind."

With respect, I do not see how this passage can support his submission that the Court has jurisdiction to substitute the New Undertaking for the Original Undertaking. What Brandon, J. said in that passage, according to my understanding, amounts to this, that is, even if the amount of security in actions *in rem* has been agreed upon by the parties, the Court still has power to vary the amount where the amount is shown to be excessive, and it is certainly far from saying that the Court has jurisdiction to vary the agreed method of giving security or to substitute a different kind of undertaking for the undertaking previously agreed by the parties.

In *The Alletta*[2], it was held that the Court has no jurisdiction to make an order releasing a security not given to the Court and not taking the form of a bail

bond under the provisions of R.S.C. Order 75, rule 16.

I am inclined to follow *The Alletta* (*supra*) in my approach to this question. I am of the view that where security in an action *in rem* is furnished by private agreement, such security can only be varied or substituted by mutual agreement of the parties or with the consent of the party affected by such variation or substitution. In the present case, the security by way of the Original Undertaking was given to the Plaintiffs, and not to the Court in the form of a bail bond as provided under our Rules of the High Court Order 70, rule 15 (which is *in pari materia* with the English R.S.C. Order 75, rule 16) and I fail to see how I have any jurisdiction to make the Order sought in this application.

As regards the second ground, I do not think that there is any merit in it. Suffice it to say that the question of hardship is wholly irrelevant, since the Plaintiffs are entitled to the security to be given as provided in the Original Undertaking, and it is not necessary for the Plaintiffs to establish liability against the Defendants so as to entitle them to such security; it is enough if the Plaintiffs merely show that they have a reasonably arguable case against the Defendants: *The Moschanthy* (*supra*).

For the reasons stated above, I would dismiss this application with costs to the Plaintiffs to be taxed.

Application dismissed.

Solicitors: *Goh & Liew; Chan, Jugah, Wan Ullok & Co.*

PUBLIC PROSECUTOR v. MOHAMED ISMAIL

[O. Cr. J. (Edgar Joseph Jr. J.) April 18, 1983]
[Penang – Criminal Trial No. 6 of 1982]

Criminal Law and Procedure – Charge of trafficking in dangerous drug – Amendment of law – Relevant date for purpose of conviction – Whether amendment constitutional – Federal Constitution, art. 7(1) – Dangerous Drugs (Amendment) Act, 1983 – Dangerous Drugs Act, 1952, s. 39(B)(1)

Constitutional Law – Retrospective amendment – Whether constitutional – Dangerous Drugs (Amendment) Act 1983 – Federal Constitution, art. 7(1).

In this case the accused was charged for an offence of trafficking in a dangerous drug, to wit, cannabis, in contravention of section 39B(1) of the Dangerous Drugs Act, 1952. The accused was found guilty. On the day when the accused was found guilty, section 39B(1) of the Dangerous Drugs Act, 1952 was amended to provide for the mandatory sentence of death upon conviction in all cases of trafficking in contravention of the section. Before the amendment, the Court had the option of sentencing the accused to death or imprisonment for life. The question which arose was what is the material date for determining sentence for such offences, is it the date of the offence or the date of conviction? The further question would arise if the material date was the date of conviction whether the amendment was constitutional so far as cases committed before the date of its coming into force was concerned.

Held: (1) purely as a matter of construction and considered by itself, section 39B(1) of the Dangerous Drugs Act, 1952, in the form it now takes is open to only one reasonable construction, namely that it is the date of conviction which is the relevant date for purposes of sentencing;

(2) the sub-section if it operates retrospectively, is clearly a law which comes within the striking range of Article 7(1) of the Federal Constitution and is therefore invalidated so far as cases where the offence was committed prior to the date of its coming into force are concerned;

(3) the Court therefore has a discretion in the matter of sentence as it is the subsection in the form it took prior to the amendment which applies.

[Editorial note: the accused was sentenced to life imprisonment and ordered to be given six strokes on April 18, 1983. The grounds of judgment were reported at [1984] 1 M.L.J. 134]

Case referred to:

(1) *Baker and Another* v. *Queen* [1975] 3 All E.R. 55, 57-58.

CRIMINAL TRIAL.

Nordin bin Haji Sulaiman (Deputy Public Prosecutor) for the Public Prosecutor.

R. Rajasingam for the accused.

Edgar Joseph Jr. J. (ruling on the effect of the amendment to section 39B(2) of the Dangerous Drugs Act, 1952 (Rev. 1980) by the Dangerous Drugs (Amendment) Act, 1983, which came into force on April 15, 1983): When on Friday last, that is to say, on April 15, 1983 after a somewhat lengthy trial, I found this accused guilty of trafficking in a dangerous drug, to wit, cannabis, in contravention of section 39B(1) of the *Dangerous Drugs Act*, 1952 (Rev. 1980) ("the Act") I invited the prosecution and the defence to address me on the question, whether as a matter of law, I had any discretion, to impose a sentence of life imprisonment with perhaps whipping as opposed to death. I raised this question because, until the day before the subsection which provided for penalties for the offence of trafficking in a